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In the

Supreme Court of the United States

October Term, 1960

No. 477

ERNEST L. CUNNINGHAM,

Petitioner,

versus

STATE OF ALABAMA,

Respondent.

BRIEF AND ARGUMENT

In Opposition to Petition for Writ of Certiorari

To the Court of Appeals of Alabama

MacDonald Gallion
Attorney General
State of Alabama

David W. Clark
Assistant Attorney General
State of Alabama

Counsel For Respondent

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BRIEF AND ARGUMENT FOR RESPONDENT

I
OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is reported as follows:

Ernest L. Cunningham v. State, 1st Division 718, 121 So. 2d 888. The opinion of the Supreme Court of Alabama is set forth in 121 So. 2d 890.

II
JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Appeals of Alabama, rendered on June 10, 1958. Application to the Court of Appeals of Alabama for rehearing was denied on August 19, 1958. A petition to

the Supreme Court of Alabama for writ of certiorari was denied on May 19, 1960, and application to the Supreme Court of Alabama for rehearing was denied on July 14, 1960. Petitioner applies, under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTION PRESENTED

Whether the order of the appellate court dismissing an appeal will support the Supreme Court's jurisdiction when the order is based upon failure to conform to state rules of practice in perfecting the appeal.

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The petitioner was tried and convicted in the Circuit Court of Monroe County, Alabama, of first degree manslaughter arising out of the death of Thomas Earl Nettles by petitioner and he was sentenced to ten years' imprisonment. Before entering upon the trial in the Circuit Court, petitioner filed motions to quash the indictment, to quash the venire and to declare void the composition of the jury sworn to try the defendant, all motions alleging systematic exclusion of Negroes from jury services. After hearing the testimony and evidence offered by petitioner and the State, the trial court overruled the motions.

Petitioner appealed to the Court of Appeals of Alabama where the record was stricken on timely filed motion of State and the appeal dismissed becaus the record was filed

in the Court of Appeals of Alabama some four months and twenty days after the date it should have been filed. No application for extension of time for filing was made either to the trial court or to the Court of Appeals. Application for rehearing in the Court of Appeals was overruled August 19, 1958. A petition to the Supreme Court of Alabama to review judgment of the Court of Appeals of Alabama was filed, with accompanying brief, on September 1, 1958. A motion to strike petition was granted because petitioner failed to file copies of the petition and brief in support thereof upon the Attorney General until September 12, 1958, which date was more than fifteen days after the date of the overruling of petitioner's application for rehearing to the Court of Appeals. Application to the Supreme Court of Alabama for rehearing was denied on July 14, 1960.

VI

SUMMARY OF ARGUMENT

Where the order dismissing the appeal is based upon the failure to conform to State rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U. S. 89, 51 L. Ed. 385; *Chesapeake & Ohio Railway Company v. MacDonald*, 214 U. S. 191, 53 L. Ed. 963; *Hammerstein v. Superior Court*, 341 U. S. 491, 492, 95 L. Ed. 1135.

VII

ARGUMENT

In his petition for writ of certiorari to review the judgment of the Court of Appeals of Alabama, petitioner's principal contention is that Negroes were systematically excluded from jury service in Monroe County, Alabama, and that because of such exclusion he was denied the due process and equal protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States in his trial and conviction of manslaugther in the first de-

gree. Petitioner further contends that a state appellate court may not dismiss an appeal on the motion of appellee that the petitioner failed to conform to state rules in perfecting his appeal if the petitioner has raised a federal question in the trial in the lower court.

If the latter contention is sound, then it would follow that any Negro defendant by alleging a federal question however nebulous, in his trial could disregard state rules of practice in perfecting an appeal, and upon dismissal of his appeal, have this Honorable Court review the judgment of the state appellate court. Such procedures would render vitiate the powers of state courts and substantially increase the number of cases before this Honorable Court.

Petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Court of Appeals.

From the judgment of conviction of manslaughter in the first degree, petitioner appealed. The State moved to strike the record and to dismiss the appeal assigning as grounds that the entire record was filed late in the Court of Appeals. Petitioner gave notice of appeal on December 5, 1955, and on January 9, 1956, the court reporter filed a transcript of the evidence with the circuit clerk below, with notice of said filing to the attorneys of record. No objections having been filed to the transcript of the evidence within ten days, the transcript of evidence was deemed filed on January 9, 1956. The entire record was not filed in the Court of Appeals until July 30, 1956, some four months and twenty days after it should have been filed. The Court of Appeals granted the State's motion and struck the record and dismissed the appeal.

The rule governing the filing of record on appeal is set out in Rule 37, Revised Rules of the Supreme Court of Alabama, Alabama Code 1950, Title 7, Appendix, 263 [illegible] XXI as follows:

"Rule 37. (41)

"FILING TRANSCRIPT; TIME

"In all cases, either civil or criminal, the transcript shall be filed with the clerk of this court within sixty days after the signing or establishing of the bill of exceptions or the expiration of the time for establishing the same; except in equity cases the transcript shall be filed within sixty days of the taking of the appeal. Where bills of exceptions have been abolished, the transript of the record shall be filed in this court within sixty days after the transcript of the evidence has been established in the court below. The trial judge may extend the time for filing transcript of the record in this court or good cause shown for not to exceed thirty days, provided that in no event shall such extension project the time for filing the transcript beyond ninety days. Thereafter the time for filing in this court may be extended only by this court for good cause shown upon petition in writing of which adversary counsel must have ten days' notice. The application to the trial judge and a ruling thereon is a prerequisite to making the application to this court, unless it is shown that the trial judge was unavailable or that the application to him for an extension was not made for a good and sufficient reason. A copy of any order of trial judge extending the time for filing transcript shall be filed by appellant in this court within five days from the date of such order. Amended February 17, 1956."

This Rule 37 has been discussed at some length in the case of *Robert Horace Hornbuckle v. the State of Alabama*, 268 Ala. 347, 105 So. 2d 864. A portion of this case is quoted as follows:

"MERRILL, Justice.

"Appellant was convicted of murder in the second degree and sentenced to ninety-nine years imprisonment in the penitentiary.

"The State has filed a motion to dismiss the appeal because the transcript was filed more than sixty days

after the transcript of the evidence was established in the trial court.

"Supreme Court Rule 37, as amended, Code 1940 Tit. 7, Appendix, provides that the transcript shall be filed with the clerk of this court within sixty days after the transcript of the evidence has been established in the court below. It also provides that the trial court and this court may extend the time for filing the transcript with this court—263 Ala. XXI. There is nothing in the record to indicate that an extension of time was sought as provided by the rule.

"The transcript of the evidence was filed, and the attorneys of record notified on March 10, 1958. Lane v. State, 38 Ala. App. 487, 87 So. 2d 668, holds that the sixty day period allowed by Supreme Court Rule 37 for filing the transcript of the record begins to run from the date the transcript of the evidence is filed in the circuit court, there being no objections filed to the transcript of the evidence. Here no objections were filed and the time began to run from the date of the filing, March 10, 1958.

"Supreme Court Rule 37, as amended, would require the filing of the transcript of the record in this court within sixty days from March 10, which would be May 9, 1958. Relf v. State, 267 Ala. 3, 99 So. 2d 216. The filing occurred one day later, May 10, 1958.

"Where no extensions of time are sought, it has been held that the appellate court is precluded from 'going into the merits or demerits of the delay.' West v. State, Ala. App. 101 So. 2d 638, 639, certiorari denied 267 Ala. 700, 101 So. 2d 640.

"It follows that the motion to dismiss the appeal must be granted. This rule cannot be considered harsh when it is borne in mind that Supreme Court Rule 16 requires

that the clerk of this court 'shall notify the appellant and the appellee, or their attorneys, when the record is filed in this court.' That gives the appellant the exact date of the filing of the transcript of the record. If it appears to have been late any number of days less than thirty, and appellant can show good cause for the delay, Rule 37, as amended, protects him in providing: 'The trial judge may extend the time for filing the transcript of the record in this court for good cause shown for not to exceed thirty days, and this extension may be made within the thirty additional days, provided that in no event shall such extension project the time for filing the transcript beyond ninety days.'"

Thus, from the discussion of Rule 37, supra, it may be seen that this rule is a fair one and one subjecting petitioner to no undue hardship. If he had desired more time he is provided with a method to so apply. The application may be made to the trial court and then further application may be made to the appropriate state appellant court. It should be noted, however, that an application to the trial court and a ruling thereon is a prerequisite to applying to the appellate court for an extension. Petitioner availed himself of none of these extensions.

After the opinion of the Court of Appeals of Alabama striking the record and dismissing the appeal, petitioner's application for a rehearing in that court was overruled on August 19, 1958. Thereupon, on September 1, 1958, petition for writ of certiorari to the Court of Appeals was filed in the Supreme Court of Alabama with accompanying brief. Motion to strike petition for writ of certiorari was filed by the State showing no receipt of copy of petition and brief in support thereof within the fifteen days in accordance with Rules 11, 39, and 44, Revised Rules of Practice of the Supreme Court of Alabama. Motion was granted and application by the petitioner for rehearing was overruled.

In the past this Honorable Court has held that if the order dismissing the appeal is based upon the failure to conform

to state rules of practice in perfecting the appeal, neither the order nor the lower court judgment will support the Supreme Court's jurisdiction. *Newman v. Gates*, 204 U. S. 89, 51 L. Ed. 385; *Chesapeake & Ohio Railway Company v. McDonald*, 214 U. S. 191, 53 L. Ed 963; *Hammerstein v. Superior Court*, 341 U. S. 491, 492, 95 L. Ed. 1135.

Petitioner has twice failed to conform to state rules of practice prior to filing his petition before this Court.

A reading of *Chicago, Baltimore & Quincy Railway Company v. Illinois ex rel. Grimmond*, 200 U. S. 561, 50 L. Ed. 597, discloses no failure of compliance with state rules of practice in perfecting the appeal.

However, this Court in the case of *Chesapeake & Ohio Railway Company v. McDonald*, 214 U. S. 191, 53 L. Ed. 963, wherein a federal question was attempted to be presented, held that an appeal from an order refusing to move the case to the United States Circuit Court for the Eastern District of Kentucky had to be taken within two years as provided for by the Kentucky Civil Code of Practice.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the order of the Court of Appeals striking the record and dismissing the appeal upon filing of timely motion by the State showing petitioner's failure to conform to state rules of practice in perfecting his appeal is an order which will not support the jurisdiction of this Honorable Court. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

MacDonald Gallion
Attorney General
State of Alabama

David W. Clark
Assistant Attorney General
State of Alabama

Counsel For Respondent

CERTIFICATE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1960, I served a copy of the foregoing brief and argument on one of the attorneys for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record as follows:

To: Hon. Arthur D. Shores
1527 Fifth Avenue, North
Birmingham, Alabama

David W. Clark
Assistant Attorney General
of the State of Alabama

Administrative Building
Montgomery, Alabama